No. 12891

United States
Court of Appeals
for the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

KWAN SHUN YUE,

Appellee.

Transcript of Record

**Appeal from the United States District Court,
Southern District of California,
Central Division.**

Phillips & Van Orden Co., 870 Brannan Street, San Francisco, Calif.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS

For Appellant:

ERNEST A. TOLIN,
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For Appellee:

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Los Angeles 13, Calif.

In the United States District Court in and for the Southern District of California, Central Division

No. 131990

In the Matter of

The Petition of KWAN SHUN YUE, to Be Admitted a Citizen of the UNITED STATES OF AMERICA

AGREED STATEMENT OF FACTS ON APPEAL

The above-entitled matter came before the Court on the motion of the United States of America for an order denying the petition of Kwan Shun Yue, a national of China, for naturalization.

The petitioner applied for admission to the United States at Seattle, Washington, July 20, 1924, in possession of a certificate, as a treaty merchant, issued under Section 6 of the Chinese Exclusion Act, (22 Stats. 58, Act of May 6, 1882, as amended). The certificate had been visaed by the American Consul at Hong Kong, June 27, 1924, and petitioner sailed from China about July 2, 1924. On September 9, 1924, the Board of Review of the Department of Labor ordered the subject excluded on the ground that he was not coming to the United States as a bona fide merchant under and in pursuance of any treaty of commerce and navigation.

Habeas corpus proceedings were instituted in behalf of petitioner and others in the District Court for the Western District of Washington, and the writ was granted. The judgment of the District

Court was affirmed by the United [2*] States Court of Appeals for the Ninth Circuit on November 13, 1925, in the case of Weedin v. Wong Tat Hing, et al., 6 F. (2d) 201.

A certificate of arrival, showing petitioner's admission as a treaty merchant under Section 3(6) of the Immigration Act of 1924 was filed with the petition in this proceeding for naturalization, a copy of which is attached hereto, marked Exhibit "A-1" and made a part hereof by reference.

Said motion came on for hearing before the Honorable James M. Carter, Judge of the said District Court, on or about the 29th day of December, 1950, petitioner appearing by Benjamin W. Henderson, his attorney, and the United States of America appearing through its Immigration and Naturalization Service, of the Department of Justice by Lloyd H. Garner, Naturalization Examiner.

The Court thereupon denied the motion of the United States for the denial of the petition and the Court made a Minute Order and rendered a written opinion adopting the Findings of Fact, Conclusions of Law and Recommendations of the Designated Examiner, except as modified by said opinion, and the Court made its formal order admitting the petitioner to citizenship on January 5, 1951.

A copy of the Findings of Fact, Conclusions of Law and Recommendations of the Designated Examiner is attached hereto and marked Exhibit "A" and made a part hereof by reference. A copy of the

***Page numbering appearing at foot of page of original Certified Transcript of Record.**

Minute Order made by the Court on December 29, 1950, is attached hereto, marked Exhibit "B" and made a part hereof by reference. The written Opinion of the Court is attached hereto, marked Exhibit "C" and made a part hereof by reference. A copy of the formal Order admitting the petitioner to citizenship, which is the Order appealed from, is attached hereto, marked Exhibit "D" and made a part hereof by reference. The Notice of Appeal herein was filed on February 27, 1951, and a copy of said Notice is attached hereto, marked Exhibit "E" and made a part hereof by reference.

The points to be relied upon by appellant are:

(1) That the Court erred in holding that petitioner established a lawful admission to the United States as an immigrant for permanent residence; and

(2) That the Court erred in exempting petitioner from filing with the petition a valid certificate showing the date, place and manner of petitioner's arrival in the United States. [3]

It is hereby agreed by the parties hereto, through their respective counsel, that the foregoing is a full and true statement of the above-entitled case, showing how the questions arose and were decided by the above-entitled Court.

Dated: March 30, 1951.

/s/ BENJAMIN W. HENDERSON,
Attorney for Petitioner.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Respondent.

ORDER APPROVING AGREED STATEMENT

The foregoing Agreed Statement of the case, prepared pursuant to Rule 76 of the Federal Rules of Civil Procedure, is hereby approved, and the Clerk is instructed to attach a copy hereto of the Certificate of Arrival, No. 1600-K-5444, as an exhibit.

Dated this 2nd day of April, 1951.

/s/ JAMES M. CARTER,
U. S. District Judge. [4]

In the United States Court of Appeals
for the Ninth Circuit

THE UNITED STATES OF AMERICA,
Respondent and Appellant,

vs.

KWAN SHUN YUE,
Petitioner and Respondent.

STATEMENT OF GROUNDS OF APPEAL

An agreed statement of facts on appeal having been heretofore filed in this cause, respondent and appellant now hereby set forth its grounds for appeal:

I.

That the Court erred in holding that petitioner's admission to the United States as a treaty merchant under Section 3(6) of the Immigration Act of 1924 was admission to the United States for permanent residence for naturalization purposes.

II.

That the Court erred in holding that the petitioner, who had not filed with his petition a certificate of arrival showing admission to the United States as an immigrant for permanent residence, was exempt from the necessity of filing such certificate of arrival.

Dated at Los Angeles, California, this 30th day of March, 1951.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

ROBERT K. GREAN,
Assistant U. S. Attorney. [5]

Exhibit A

In the United States District Court, Southern District of California, Central Division

No. 131990

In the Matter of

The Petition of KWAN SHUN YUE to Be Admitted a Citizen of the UNITED STATES OF AMERICA

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE DESIGNATED NATURALIZATION EXAMINER

To the Honorable the Judges of the United States District Court, for the Southern District of California:

I.

The undersigned, duly designated pursuant to Section 333 of the Nationality Act of 1940, 8 U.S.C.

733, to conduct preliminary hearings on petitioners for naturalization, respectfully reports that the above-named petitioner, a native and national of China, age 56 years, who has lived in the United States continuously since his lawful admission on November 13, 1925, filed the petition for naturalization mentioned above on June 2, 1947, claiming the exemptions of Section 310(b) of the Nationality Act of 1940.

The question presented is whether the petitioner may be regarded as having been lawfully admitted for permanent residence for naturalization purposes.

II.

On June 2, 1947, following the filing of the petition for naturalization, petitioner and his verifying witnesses were accorded a preliminary hearing at which time petitioner testified under oath in part as follows: That he married a Chinese woman in China before [6] migrating to the United States, leaving her there; that he heard thru relatives about 1927 that she had died, leaving no children; that in 1932 he was "married" in accordance with the Chinese ritual but without compliance with California procedural requirements in Los Angeles, and has three children born of that union; that his "wife" had never been previously married; that on March 30, 1947, he was again married to the same woman in accordance with California Civil Code Section 79; that his wife is a citizen of the United States by birth in Los Angeles, California, and that they are still living together; that he has never been

arrested except by citations for minor traffic violations; that he entered the United States at Seattle, Washington, on November 13, 1925, as a treaty merchant, intending to reside here permanently, and that he has remained in the United States continuously since that admission; that his present occupation is grocery store proprietor.

III.

The record discloses that the petitioner applied for admission to the United States at Seattle, Wn., on July 20, 1924, in possession of a certificate as a treaty merchant issued under section 6 of the Chinese Exclusion Act (22 Stat. L. 58) (Act of May 6, 1882, as amended). On September 9, 1924, the Board of Review of the Department of Labor ordered that the subject be excluded in that he was not coming to the United States as a bona fide merchant under and in pursuance of any treaty of commerce and navigation. His Section 6 certificate had been visaed by the American Consul at Hong Kong on June 27, 1924, and he had sailed from China about July 2, 1924. Habeas corpus proceedings were instituted in his behalf and the U. S. District Court for the Western District of Washington, Northern Division, granted the writ on July 13, 1925. The judgment of the District Court was affirmed by the U. S. Court of Appeals for the Ninth Circuit, November 13, 1925 (Wong Fat Hing, et al., 6 F. 2d 201.) A certificate of arrival, qualified to show the true character of his admission as a treaty merchant under section 3(6) of the Immi-

gration Act of 1924 has been filed with the petition. [7]

The issue in the instant case should not be confused with recent decisions holding that Chinese persons who have been admitted to the United States subsequent to July 1, 1924, as minor children of Chinese merchants who had been admitted to the United States prior to July 1, 1924, could be considered as having a lawful admission for permanent residence for naturalization purposes (Wong Choon Hoi, 71 F. Supp. 160, appeal dismissed 164 F. 2d 699, 9th Cir., 1947; Petition of Chi Yan Cham Louie, 70 F. Supp. 493, app. dism. 166 F. 2d 15, 9th Cir. 1947; Pet'n of David Jow Gin, USD Court, Chicago, #323406, app. dism. 7th Cir. 6/9/49, 175 F. 2d 299; and Petition of Yung Poy, 177 F. 2d 144). In those cases the fathers had been admitted prior to July 1, 1924, and were considered as having a lawful admission for permanent residence. In the instant case the petitioner's first arrival in the United States was after July 1, 1924. He was admitted on his own status as a merchant and not on the basis of any rights derived from a person who had previously been admitted for permanent residence.

The instant petitioner's right to enter the United States was predicated essentially upon Article II of the Treaty of Commerce and Navigation with China, dated November 17, 1880, which provides in part as follows:

> Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and

household servants, and Chinese laborers who are now in the United States shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation.

Since the instant petitioner entered the United States after July 1, 1924, his status must also be evaluated in the light of the Immigration Act of 1924, 43 Stat. 153, which became effective on July 1, 1924. It is not disputed that Chinese merchants and their families who entered the United States prior to July 1, 1924, may be regarded as admitted for permanent residence, as neither the Treaty nor the Act of May 6, 1882, as amended by the Act of July 5, 1884, then in effect, contained any limitation restricting the term or nature of their stay [8] in the United States. However, in enacting the Immigration Act of 1924, Congress made drastic revisions in the earlier patterns of regulation. All aliens seeking to enter the United States were designated as immigrants, except the groups classified as non-immigrants in Section 3, 8 U.S.C. 203. Immigrants were required to obtain immigration visas, and, except for those classified as non-quota immigrants, were subject to quote restrictions. [Sections 4, 11, 13(a), Immigration Act of 1924, 8 U.S.C. 204, 211, 213(a)]. Section 3(6) of the 1924 Act, 8 U.S.C. 203(6), classified as a non-immigrant, "an alien entitled to enter the United States solely to

carry on trade under and in pursuance of the provisions of a present existing treaty of commerce and navigation."

In enacting section 3(6) of the 1924 Act, Congress did not seek to nullify existing treaties. On the contrary, the legislative history indicates that Section 3(6) was designated to safeguard treaty obligations. (House Rep. 360, 68th Cong., 1st Sess.). But in limiting the terms of admission, Congress actually was effectuating the purpose of the treaties, which sought merely to enable nationals of the contracting nations to enter for the purposes of trade, and not for permanent settlement. This aim seems clearly shown in the 1880 treaty with China, which lists merchants with traders, students and travelers for curiosity—clearly not permanent settlers—and authorized the excepted categories "to go and come of their own free will and accord." This hardly appears to have envisioned a formula for permanent settlement. Congress in the 1924 Act, therefore, deliberately excluded the treaty merchants from its designation as immigrants—those coming for permanent residence—and listed them with the non-immigrants—whose sojourn was limited in period or purpose. It can hardly be disputed, therefore, that treaty merchants, including those who entered under the treaty with China, admitted to the United States after June 30, 1924, are not classed as permanent residents for naturalization purposes.

In the case of In re Pezzi, 29 F. 2d 999, DC Calif. 1928, there came before the Court a petition for naturalization of a woman [9] who had entered the

United States in 1925 as a non-immigrant alien. In 1926 she was granted permission by the Department of Labor to remain in the United States indefinitely, so long as her husband maintained his status as a treaty merchant. The record showed that the petitioner was admitted to the United States under Section 3 (2) of the Immigration Act of 1924 and that her status was later changed to that of the wife of a treaty merchant under Section 3(6) of that Act. The petitioner had resided in the United States for the statutory period and urged that she intended to remain permanently in the United States; that, consequently, she was lawfully admitted to the United States for permanent residence and was therefore eligible for naturalization. The Court denied the petition, and held, at page 1001:

> In order to be entitled to naturalization, an alien must establish lawful entry into the United States as an immigrant, with intent to remain in the United States permanently. An alien who enters the United States without inspection and admission as an immigrant for permanent residence is not entitled to naturalization under our statutes. Kaplan vs. Tod, 267 US 228, 45 S.Ct. 257, 69 L. Ed. 585; In re Kempson, et al., 14 F. 2d 668; In re Jensen, 11 F. 2d 414; Ex Parte Marchant, et al., 3 F. 2d 695.

The Court further said, at page 1002:

> Has the petitioner here met the requirements of the law? I think not. The petitioner has no status in the United States, other than being

the wife of her husband. Her husband's status is defined by the provisions of Sec. 3 of the Quota Act of 1924 and the treaty of commerce and navigation between the United States and Italy of 1871 (17 Stat. 845). This treaty defines the status of "Italian citizens in the United States and citizens of the United States in Italy." Article 1. It clearly contemplates the temporary stay of the merchants of one country in the territory of the other. It accentuates the fact that the citizen of the one country is entitled to certain rights and privileges in the other country, including the privilege of being accompanied by wife, minor children, servants, etc., solely and wholly because such citizen of one country is in the other country, temporarily, and for no other purpose than to carry on trade. There is not the slightest thought involved in the language of the treaty that the citizen of one country, residing in the other country as a treaty merchant, is laying the foundation for becoming a citizen of the other. Everything in the treaty negatives that thought.

Neither the petitioner nor her husband could have been admitted, under the credentials they carried, as immigrants or as persons coming for the purpose of permanently residing in the United States. They were admitted specifically as non-immigrant aliens, and specifically under the language of the Quota Law of 1924, as "aliens entitled to enter * * * [10] solely to carry on trade under and in pursuance of the

provisions of a present existing treaty of commerce and navigation." 8 U.S.C. 203. The word "solely" there means exactly what it says.

The Court referred to the argument of counsel as to the petitioner's rights under the treaty with Italy, and said:

> The treaty rights are clear and unambiguous, and are limited solely to the right of all the freedom of movement and protection under our laws that are essential to the carrying on of trade as a citizen of a friendly nation, really moving in this country under the flag of his own country and being here for temporary purposes. The Immigration Quota Act of 1924 sharpens this doctrine of the rights of a treaty merchant and is wholly in harmony with it. Should it be true that the Immigration Act contains additional limitations, that makes the status of the treaty merchants all the more pronounced.

The Court consequently rules that the petitioner had not complied with the requirements of the naturalization laws as to an entry into the United States for permanent residence, and that therefore her petition must be denied. It should be noted that the treaty that was under consideration in the Pezzi case, the treaty with Italy of February 26, 1871, specifically provided that the citizens of the respective countries parties to the treaty would have the "liberty to sojourn and reside in all parts whatever of said territories," referring to the territories

of the countries. They were also given the right to enjoy the privileges and rights of natives of the countries and to carry on trade and commerce with restriction (17 Stat. 845). Likewise, under Article II of the treaty citizens of each of the countries had the right to travel in the states and territories of the other country.

The similarity between the foregoing case and the present issue cannot lightly be disregarded. In both cases the petitioners were admitted to the United States subsequent to the passage of the Immigration Act of 1924; in both cases the status of the petitioners was that of a non-immigrant under section 3(6) of that Act, with the right to remain indefinitely in the United States; in both cases the immigration status of the petitioners was based upon a treaty with a foreign country relating to trade and commerce. No good reason, in fact or law, can be discerned why the rule in the case of In re Pezzi [11] should not apply to the present issue particularly since the cited case is not unique but represents a theory of law which has been uniformly followed.

In the case of Subhi Mustafa Sadi v. U. S., 48 F. 2d 1040 (2d Cir. 1931), a petition for naturalization was filed by a person who had entered the United States on August 1, 1923, as a non-quota immigrant, student, under the Immigration Act of 1921. Deportation proceedings were instituted against him and upon application for habeas corpus such proceedings were dismissed on the ground that he was exempt from the quota and not subject to

deportation. In connection with his petition for naturalization, the subject argued that the order sustaining the writ of habeas corpus fixed his status as an alien admitted to the United States for permanent residence. The Court denied the petition for naturalization, and stated:

> This appears to be a case of unusual hardship, but the status above quoted explicitly forecloses any right to the appellant to be admitted to citizenship on his pending petition. We do not now undertake to determine whether or not he was entitled to entry for permanent residence at the time he was admitted at Boston. The fact remains that he was not so admitted, and while that record stands he cannot comply with the statute requiring his lawful entry for permanent residence to be established. See In re Weig, 30 F. 2d 418.
>
> It is urged that the order sustaining the writ of habeas corpus fixed his status as that of an alien admitted for permanent residence. To the extent that it had the effect of preventing his deportation upon the warrant which had been issued, it did, of course, lend some color of permanence to his stay, in that he successfully withstood that attempt to deport him, but it did not change in any respect the terms and conditions of his original entry. It simply gave effect to the right he then possessed to remain in this country notwithstanding the order of deportation which had been issued. In respect

> to his ability to lay an essential foundation for his admission to citizenship, he stands in exactly the same situation he would have been had no warrant for his deportation been issued and no writ of habeas corpus sustained in his behalf.

Upon rehearing the Court again said, at page 1041:

> To be sure, his discharge on the writ of habeas corpus did, as we said before, establish his right to remain in this country in spite of the effort then being made to deport him, but, because it did not necessarily require proof that he had been admitted for permanent residence, it now is of no aid to him when he must show that fact as a condition precedent to the validity of his petition for naturalization. See U. S. ex rel. Gentile v. Day, 25 F. 2d 717.

Here again we see a decision by an appellate court to the effect [12] that the mere fact that a petitioner for naturalization is not deportable, does not create a lawful admission for permanent residence for naturalization purposes. A similar decision was made in Warblow v. U. S., 134 F. 2d 791 (2d Cir. 1943), where the Court in ruling upon the question of lawful continuous residence required of a petitioner for naturalization, said, at page 792:

> If what is a legal admission for permanent residence for the purposes of naturalization is to be determined in accordance with the immigration laws, it is clear that the appellant had not resided in this country for at least two

> years immediately preceding the date of his petition in pursuance of a legal admission for permanent residence.

The Court further said:

> When aliens enter the United States they are lawfully here for permanent residence only if they have complied with the requirements of the laws of this country applicable to the incoming of such people. Those laws are the immigration laws and so far as we know, or the appellant has been able to point out, are the only laws under which the right, or the contrary, of an alien to come here and stay may be determined. When the nature of his residence in the United States has been so determined, his status under the naturalization laws is established so far as that feature is concerned. They set up no different general standards of their own in that regard.

It can be seen, therefore, that insofar as the decisions of the courts are concerned, it is the established rule that a petitioner for naturalization must establish a lawful admission to the United States for permanent residence as an immigrant. The mere fact that the alien is not deportable does not create a status of lawful permanent residence in the United States, nor does a lawful admission as a non-immigrant constitute a basis for a petition for naturalization.

On December 17, 1943, Congress passed the Chinese Exclusion Repeal Act (57 Stat. 600). Sec-

tion 3 of the Statute directed that Chinese persons or persons of Chinese descent be added to the racial groups that are eligible for naturalization. In enacting this legislation, Congress did not contemplate that all Chinese persons in the United States should thereby be naturalized. On the contrary, Congress merely put the Chinese on a parity with other racial groups and insisted that they qualify for naturalization on the same terms [13] as all other applicants. This design was specifically asserted by the Congressional Committees which considered the legislation, in the following language (House Rep. 732; Sen. Tep. 535, 78th Congr., 1st Sess.):

> The number of Chinese who will actually be made eligible for naturalization under this section is negligible. There are approximately 45,000 alien Chinese persons in the United States (continental, territorial, and insular). However, a large number of these Chinese have never been admitted to the United States for lawful permanent residence, which is a condition precedent to naturalization and, therefore, many of this number could not be eligible for naturalization, not because of racial disability, but because they cannot meet existing statutory requirements of the law. The number of Chinese who will be made eligible in the future, in addition to those already here, will of necessity be very small because the quota for China is limited to 105 per annum, as provided for in Section 2 of this bill.

It is concluded that Congress contemplated granting the privilege of naturalization only to those Chinese aliens who were lawfully admitted to the United States for permanent residence as immigrants. As this petitioner was admitted as a nonimmigrant, he is not considered as having been lawfully admitted to the United States for permanent residence for naturalization purposes, and the certificate of arrival which forms the basis of his petition for naturalization is not a valid certificate of arrival for naturalization purposes.

IV.

Pursuant to the provisions of Section 333 of the Nationality Act of 1940, 8 U.S.C. 333, I hereby make the following findings of fact and conclusions of law:

Findings of Fact

(a) That the petitioner is an alien, and filed a petition for naturalization on June 2, 1947;

(b) That the petitioner was admitted to the United States on November 13, 1925, pursuant to the provisions of Section 3(6) of the Immigration Act of 1924, and has resided in the United States continuously since that date;

(c) That petitioner has not filed with his petition a certificate of arrival showing admission to the United States as an [14] immigrant for permanent residence; and

(d) That petitioner has not established facts showing that he is exempt from the necessity of filing such certificate of arrival.

Conclusions of Law

(a) That the petitioner has failed to establish lawful admission to the United States as an immigrant for permanent residence;

(b) That a valid certificate of arrival, showing the date, place and manner of arrival in the United States, as required or contemplated by Section 332 of the Nationality Act of 1940, 8 U.S.C. 732, was not filed with the petition, and petitioner is not exempt from such procedural requirement; and

(c) That petitioner may not be naturalized.

V.

I therefore recommend that the petition of Kwan Shun Yue for naturalization be denied on the grounds that (a) petitioner has failed to establish lawful admission to the United States for permanent residence and (b) that a valid certificate of arrival was not filed with the petition, and petitioner has not established exemption from such requirement.

Respectfully submitted,

LLOYD H. GARNER,
U. S. Naturalization
Examiner.

August 21, 1950, Los Angeles, Calif.

U. S. Department of Justice
Immigration and Naturalization Service
Rev. 10-1-44

No. 1600-K-5444

Certificate of Arrival

I hereby Certify that the immigration records show that the alien named below arrived at the port, on the date and in the manner shown, and was lawfully admitted to the United States of America under Section 3(6) of the Immigration Act of 1924.

Name: Kwan Shun Yue.
Port of entry: Seattle, Washington.
Date: Nov. 13, 1925.
Manner of arrival: SS President Grant.

I Further Certify that this certificate of arrival is issued under authority of and in conformity with the provisions of the Nationality Act of 1940 solely for the use of the alien herein named and only for naturalization purposes.

In Witness Whereof this Certificate of Arrival is issued May 6, 1947.

[Seal] /s/ UGO CARUSE,
Commissioner. [15]

Exhibit B

At a stated term, to wit: The September Term A. D. 1950, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Friday, the 29th day of December, in the year of our Lord one thousand nine hundred and fifty.

Present: The Honorable James M. Carter,
District Judge.

[Title of Cause.]

MINUTE ORDER

This matter having been duly heard and submitted, and the Court having duly considered the matter, the Court now hands down its Opinion, which is filed; and, pursuant to said Opinion, it is ordered that the motion of the United States for the denial of the petition be denied, and that the petition for citizenship be granted. The Court adopts the findings of fact and conclusions of law of the Examiner, except as they are modified by the Opinion; counsel for the government will present formal order for Court's signature within 10 days, and will arrange with opposing counsel and the Court to have the petitioner personally present in open court at that time for the purpose of administering the oath of allegiance and such further proceedings as are required by law. [16]

Exhibit C

In the District Court of the United States, Southern District of California, Central Division

No. 131990

In the Matter of
The Petition of KWAN SHUN YUE, to Be Admitted a Citizen of the UNITED STATES OF AMERICA

OPINION

BENJAMIN W. HENDERSON,
308 Pershing Square Building,
448 S. Hill Street,
Los Angeles, California,
MAdison 2766,
Attorney for Petitioner.

LLOYD H. GARNER,
Naturalization Examiner,
Immigration & Naturalization Service,
458 S. Spring Street,
Los Angeles, California,
MUtual 1281,
For the United States.

Carter, James M., District Judge.

This matter comes before the court on the motion of the United States of America for an order denying the petition of Kwan Shun Yue, a National of

China, for naturalization, on the ground (1) that petitioner has failed to establish a lawful admission to the United States as an immigrant for permanent residence, and (2) on the further ground that [17] a valid certificate showing the date, place and manner of petitioner's arrival in the United States, was not filed with the petition, and that petitioner has not established exemption from such requirement.

The particular question to be decided is the effect of the Immigration Act of May 26, 1924, c. 190 (43 Stats. 1531) and Sec. 3 thereof (8 U.S.C. §203) which became effective July 1, 1924, on Chinese treaty merchants entering the United States after the effective date of that statute, when read in connection with the treaty between this country and China, of November, 1880[1] (22 Stats. 8261 and the subsequent treaty of March, 1894[2] (28 Stats. 1210).

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[1]The pertinent section of Article II of the Treaty reads as follows: "Chinese subjects, whether proceeding to the United States as teachers, students, merchants or from curiosity, together with their body and household servants, and Chinese laborers who are now in the United States, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation."

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[2]The pertinent section of the Treaty is Article III, which reads as follows: "The provisions of this convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travellers for curiosity or pleasure,

The Facts

The facts, as found by the designated Examiner, show that petitioner applied for admission to the United States at Seattle, Washington, July 20, 1924, in possession of a certificate, as a treaty merchant, issued under Section 6 [18] of the Chinese Exclusion Act (22 Stats. 58, Act of May 6, 1882, as amended). The certificate had been visaed by the American Consul at Hong Kong, June 27, 1924. On September 9, 1924, the Board of Review of the Department of Labor ordered the subject excluded on the ground that he was not coming to the United States as a bona fide merchant under and in pursuance of any treaty of commerce and navigation.

Habeas corpus proceedings were instituted in behalf of petitioner and others in the District Court for the Western District of Washington, and the writ was granted. The judgment of the District Court was affirmed by the United States Court of Appeals for the Ninth Circuit on November 13, 1925, in the case of Weedin v. Wong Tat Hing, et al., 6 F. (2d) 201.

The findings of the designated Naturalization Examiner in the present proceeding for naturalization, contains the statement, "A certificate of ar-

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but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their government or the government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart * * *" (Emphasis added.)

rival, qualified to show the true character of his admission as a treaty merchant under Section 3(6) of the Immigration Act of 1924 has been filed with the petition." (8 U.S. Code §203(6) 1).

The Law

Petitions for the naturalization of Chinese aliens who as children of treaty merchants, entered the United States after July 1, 1924, but whose fathers, the treaty merchants, entered the United States before July 1, 1924, have been before the courts and the cases have uniformly held that the admission of the treaty merchant (the father) prior to July 1, 1924, made legal the subsequent admission of the children to the United States, and that the child's residence was of such a permanent character as to be sufficient for naturalization purposes. Petition of Wong Choon Hoi (C.C.S.D.Cal.), 71 F. Supp. 160; appeal dismissed 164 F.(2d) [19] 696, on the ground that the appellant was not a proper party. In re Chi Yan Cham Louie, (D.C.W.D. Wash.) 70 F. Supp. 493; appeal dismissed 166 F.(2d) 15, on the ground appellant was not a proper party. In re Jow Gin, (7 Cir.) 175 F.(2d) 299; United States v. Yung Poy (9 Cir.) 177 F.(2d) 144.

The Government now urges, however, that because of the provisions of the Immigration Act of May 26, 1924, (43 Stats. 153) Title 8, U.S.C., Sec. 203[3]

[3]"§203. Immigrant defined. When used in this chapter the term 'immigrant' means any alien departing from any place outside the United States destined for the United States, except * * * (6) an

that the Congress, in substance, created two classes of people entering the United States, immigrants and non-immigrants, and the Congress, in the Act, deliberately excluded treaty merchants from the designation as immigrants, (i.e. those coming for permanent residences) and listed them with the non-immigrants, and that therefore petitioner, arriving after July 1, 1924, was not admitted to the United States for permanent residence and cannot be naturalized.

It is elemental that Congress, by statute, cannot vary or diminish rights created under a treaty, and the courts have consistently held that the various immigration acts passed after the treaties with China in 1880 and 1884, do not abrogate, nullify or abridge the rights of Chinese to enter pursuant thereto. Haff v. Yung Poy, (9 Cir. 1933) 68 F.(2d) 203.

We choose to rely particularly on the decision by Judge Mathes in the petition of Wong Choon Hoi, 71 F. Supp. [20] 160, supra. It is well reasoned and collects the authorities. The factual situation in that case concerned the son of a Chinese merchant who had entered the United States in 1934, while his father had previously entered the United States before July 1, 1924. The case holds that the minor son, upon entry, acquired the domicile of his father

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alien entitled to enter the United States solely to carry on trade between the United States and the foreign state of which he is a national under twenty-one years of age, if accompanying or following to join him. * * *"

and that the domicile was sufficient to permit the naturalization of the son. The reasoning of the case, and the authorities, apply equally to a treaty merchant entering the United States after July 1, 1924.

But it further appears to the court that the language of the articles of the two treaties heretofore set forth in the margin, contain in their very language provisions that the treaty merchant shall have domicile or permanent residence in the United States.

The Treaty of 1880 in Article II, provides that Chinese merchants "shall be accorded all rights, privileges, immunities and exemptions which are accorded to the citizens and subjects of the most favored nation." This certainly would include the right to permanent residence or domicile sufficient for naturalization.

The Treaty of 1884, in Article III, provides that "the provisions of this convention shall not affect the right at present enjoyed of Chinese * * * merchants * * * of coming to the United States and residing therein. The words "residing therein" indicate clearly the intention of the treaty making powers to provide for permanent residence or domicile in the United States on the part of Chinese merchants and the other classes therein enumerated.

The Government cites cases to the effect that the mere fact that an alien is not deportable does not create a status of lawful permanent residence in the United States. [21]

Subhi Mistafa Sadi v. U.S., (2 Cir.) 48 F. (2d) 1040; Werblow v. U.S., (2 Cir.) 134 F. (2d) 791.

The court has no disagreement with these holdings.

We hold that the petitioner was lawfully admitted to the United States for permanent residence sufficient for naturalization purposes; and in view of the findings by the designated Examiner that the petitioner, upon his application for admission to the United States was in possession of a certificate as a treaty merchant issued under Section 6 of the Chinese Exclusion Act, and that a certificate of arrival qualified to show the character of his admission as a treaty merchant under Section 3(6) of the Immigration Act of 1924 has been filed with his petition, it follows that both grounds of objection by the United States fail.

The motion of the United States is denied and the application of Kwan Shun Yue for naturalization is granted. The findings of fact, conclusions of law and recommendations of the designated Examiner are adopted by this court, except as they are modified by this opinion. Formal order will be prepared by counsel. [22]

Exhibit D

Form N-484-A
U. S. Department of Justice
Immigration and Naturalization Service
(Edition of 5-15-44)

Vol. 14 page 208

Date: January 5th, 1951 List No. 147

This list consists of two sheets.

Sheet No. 2

ORDER OF COURT

In the District Court of the United States

Southern District of California,
Central Division—ss.

Upon consideration of the petitions for naturalization listed on List No. 147, sheets 1 to 2, dated January 5th, 1951, presented in open Court this 5th day of January, A.D. 1951, It Is Hereby Ordered that each of the said petitions be, and hereby is, denied, except those petitions listed below.

Recommendations of Designated Officer Is Disapproved as to the Petitions Listed Below, and each of said petitioners so listed having appeared in person, It Is Hereby Ordered that each of them be, and hereby is, admitted to become a citizen of the United States of America. Prayers for change of name listed below granted, except in petition No. ....

Petition No.: 131990.
Name of Petitioner: Kwan Shun Yue.
Change of Name: Sun Yee Quon.

The Court adopts the findings of fact and the conclusions of law contained in the recommendation of the designated Naturalization Examiner filed herein, except as they are modified by the Opinion of the Court entered herein on December 29, 1950.

It is further ordered that petitions listed below be continued for the reasons stated.

Petition No.: .....
Name of Petitioner: .....
Cause for Continuance: .....

By the Court.

JAMES M. CARTER,
Judge. [23]

Exhibit E

In the United States District Court in and for the Southern District of California, Central Division

No. 131990

In the Matter of

The Petition of KWAN SHUN YUE, to Be Admitted a Citizen of the UNITED STATES OF AMERICA

NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Notice Is Hereby Given that the United States of America, respondent to the petitioner above named, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of the Court admitting petitioner to citizenship

made on January 5, 1951, and entered on said date in Civil Order Book Volume 14, at page 208.

Dated at Los Angeles, California, this 27th day of February, 1951.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney.

Attorneys for Respondent and Appellant, United States of America.

[Endorsed]: Filed April 2, 1951. [24]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 24, inclusive, contain the original Agreed Statement of Facts on Appeal which constitutes the record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 4th day of April, A.D. 1951.

[Seal] EDMUND L. SMITH,
Clerk,

By /s/ THEODORE HOCKE,
Chief Deputy.

States as an immigrant for permanent residence, was exempt from the necessity of filing such Certificate of Arrival.

Appellant designates the entire record to be printed.

Dated at Los Angeles, California, this 30th day of March, 1951.

ERNEST A. TOLIN,
United States Attorney.

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division.

/s/ ROBERT K. GREAN,
Assistant U. S. Attorney,
Attorneys for Appellant.

Affidavit of Service by Mail attached.

[Endorsed]: Filed April 5, 1951.